82-1251

No. A-593

In the Supreme Court of the United States

October Term, 1982

RICHARD J. ROME,
Petitioner,

vs.

SUPREME COURT OF KANSAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE U.S. 10th CIRCUIT COURT OF APPEALS

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QUESTION PRESENTED FOR REVIEW

Was it error for the 10th Circuit Court of Appeals of the United States to dismiss the Petitioner's appeal from a direct order of the United States District Judge, Luther B. Eubanks, dismissing his 42 U.S.C. 1983 complaint with prejudice on March 23, 1981, in Case Number 81-1084, Rome v. Supreme Court of Kansas, the U. S. District Court for the District of Kansas, as being moot under the circumstances herein?

Parenthetically, was the action of the Court below a denial of Petitioner's right to due process of law under the U. S. Constitution?

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OPINIONS BELOW

The opinion of the 10th U. S. Circuit Court of Appeals is not reported but is set out in Appendix A. The order of said Court denying a motion for rehearing is also not reported but is set out in Appendix B. The order and opinion of the U. S. District Court for the District of Kansas is set out in Appendix C.

JURISDICTION

The opinion of the 10th U. S. Circuit Court of Appeals was filed on August 19, 1982. A timely motion for rehearing was filed on or about September 3, 1982. The order denying the motion for rehearing was entered on October 6, 1982. On or about December 30, 1982, an application for extension of time to file this Petition for a Writ of Certiorari was filed, and on January 4, 1983, U. S. Supreme Court Justice, Byron White, ordered an extension of time to file said Petition up to and including February 3, 1983.

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1). The instant Petition for a Writ of Certiorari is timely filed.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V

> "No person shall . . . be deprived of life, liberty, or property, without due process of law;"

United States Constitution, Amendment XIV

> Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On February 10, 1981, the Supreme Court of Kansas entered an order removing petitioner from his position as Associate District Court Judge for alleged violations of

the Code of Judicial Conduct. Petitioner's motion for rehearing was denied by the Supreme Court of Kansas. Petitioner then filed this action under 42 U.S.C. 1983 in federal district court to enjoin removal and appointment of a successor pending disposition of his petition for writ of certiorari to the United States Supreme Court from the decision of the Kansas Supreme Court. On March 23, 1981, the district court dismissed the complaint with prejudice sua sponte, holding that it was improper for a federal court to intervene in state court disciplinary matters. Petitioner appealled to the 10th U.S. Circuit Court of Appeals.

After the filing of the appeal, this court denied Petitioner's petitions for writ of certiorari and for rehearing. The Respondent filed a motion to dismiss the appeal as moot pursuant to 10th Circuit Rule 9 in view of the Supreme Court's rulings. On August 19, 1982, the 10th Circuit dismissed the appeal as being moot. A petition for rehearing was denied on October 6, 1982. It is these two decisions as well as that of the district court that Petitioner seeks to have reviewed.

REASON WHY THE WRIT SHOULD BE GRANTED

THE 10TH CIRCUIT COURT OF APPEALS HAS DENIED THE PETITIONER'S RIGHT TO DUE PROCESS OF THE LAW BY DISMISSING HIS APPEAL BELOW, THEREBY GIVING ITS STAMP OF APPROVAL TO THE DISTRICT COURT'S APPLICATION OF THE DOCTRINE OF ABSTENTION IN DISMISSING THE COMPLAINT WITH PREJUDICE, WITHOUT NOTICE THEREOF, HEARING THEREON, OR OPPORTUNITY TO BE HEARD; IN EFFECT DENYING THE PETITIONER THE RIGHT TO EVER BRING A FURTHER ACTION UNDER 42 U.S.C. 1983.

ARGUMENT

The District Court below abused its discretion in summarily dismissing the Petitioner's Complaint. It further abused its discretion by dismissing the Complaint *with* prejudice. In a poorly written and disorganized opinion, the lower Court adds confusion to its digression. On Page 2 of said opinion the Court, "sua sponte", orders the Complaint "and all causes of action therein attempted to be stated dismissed". Then, in the final wrap-up of the opinion the Court dismisses the Complaint and simply *the* "cause of action therein stated".

To borrow from Judge Eubanks, "it is elementary" in American jurisprudence that all litigants have a right to be heard. They may not have a right to win their case or their point, but they certainly have a right to have their say. That doctrine is known as due process of the law. It is guaranteed to every citizen in the United States of America. It is extended to and applied to the individual States of the Union by the 14th Amendment to the U. S. Constitution. Simply stated it means every citizen involved in a legal controversy is entitled to fair notice of a hearing and he is entitled to a fair opportunity to be heard.

Reduced to complete simplicity, due process is nothing else but good old fashioned courtesy. Civilized people are, generally, and hopefully, courteous people. When judges don their traditional black robes, they don't cease to be people. Further, they don't cease being courteous.

Judges are supposed to apply the law in a case. In many instances that function allows a Court a certain amount of "discretion". Judicial discretion has been defined as "the sound choosing by the Court, subject to

the guidance of the law, between doing or not doing a thing, the doing of which cannot be demanded as an absolute right". *Chapman v. Dorsey*, 230 Minn. 279, 41 NW 2d 438, 16 ALR 2d 1015.

Applying the above definition to the case at hand, can it be said, fairly, that Judge Eubanks properly exercised his discretion? This writer thinks not. A serious and perfectly legitimate lawsuit has been filed in the U. S. District Court for the District of Kansas. All parties had been served. A motion for a temporary restraining order had been filed. Time was of the essence. All U.S. Judges in Kansas had recused themselves. Then, Judge Eubanks, "sua sponte", dismisses the entire proceeding without notice and without letting anyone be heard. With a single stroke of his pen, and in the silence and majesty of his taxpayer provided office, he adds to the damage by preventing the Petitioner from ever filing the "cause" or "causes" of action again.

It is the duty of Federal District Courts to adjudicate controversies legally before them. A narrow and extraordinary exception to this rule arises when those Federal District Courts decline to exercise or postpone the exercise of their jurisdiction in deference to State Courts. This doctrine is known as the "abstention doctrine". The Courts simply abstain from entering the fray. Abdication of the duty to adjudicate cases before a Court can be justified only in exceptional circumstances, or where such an order would *clearly* serve an important countervailing interest.

Judge Eubanks, below, justifies abdication of his sworn duty to adjudicate on Page 2 of his opinion where he dares not to "intervene into the actions of another court". He would emphatically not venture into the forbidden "area of state-federal judicial relations". Perhaps his choice of the placement of the two entities in the order he

did says something of his philosophy, which certainly goes to discretion. Judge Eubanks finds such a venture "especially" "intolerable" in the area of judicial disciplinary proceedings.

The lower Court cites *Del Rio v. Kavanagh*, 441 F. Supp. 220, as authority for abdication of his duty to adjudicate. Clearly, *Del Rio*, supra, is not in point. Petitioner has no quarrel with the reasoning of Judge Joiner in that opinion. However, it is simply not in point. In *Del Rio*, supra, the judge was found guilty by the judicial commission on February 28, 1977. *After* that finding and recommendation to the Supreme Court of Michigan, the judge commenced a lawsuit in the U. S. District Court. Petitioner agrees with the application of the abstention doctrine in these circumstances, because the judge therein had failed to exercise all of his state remedies. Under Michigan law he was entitled to a full hearing before the Michigan Supreme Court. He was entitled to file for a rehearing. Further, he was entitled to ask the State Court to stay the enforcement of the decree pending certiorari. The distinguishing factor between *Del Rio*, supra and the case at hand is, as stated above, that the Petitioner herein had exhausted all of his state remedies. He had no other place to go except to the U. S. District Court in Kansas under 42 U.S.C. 1983.

Judge Eubanks also cited *O'Neill v. Battisti*, 472 F. 2d 789, cert. denied, 411 U.S. 964, as authority for the application of the doctrine of abstention in judicial disciplinary proceedings. Again, the case is not in point. There, disciplinary action against the judge was in progress in the Ohio Supreme Court. He was suspended indefinitely from his duties as a judge and from practicing law. Before the Ohio Supreme Court heard the matters, the judge filed a lawsuit in the U. S. District Court in Ohio under

42 U.S.C. 1983. There, he was at least heard by the District Judge, obtaining a temporary restraining order. The Sixth Circuit issued a writ of mandamus vacating that order, and prohibited the District Court from further interfering in the Ohio disciplinary matters.

In *O'Neill*, supra, the Sixth Circuit Court of Appeals quoted from a temporary order of one of its judges staying order as follows:

> "the doctrine of abstention requires that the issues in this case which finds its roots in the judicial system of the State of Ohio *be first resolved* by the Ohio Supreme Court....." (Emphasis supplied).

Further, *O'Neill*, supra, quotes from a U. S. Supreme Court decision, *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 297, 90 S. Ct. 1739, 1748, 26 L. Ed. 2d 234, as follows:

> "Any doubts as to the propriety of a federal injunction against State Court proceedings should be resolved in favor of *permitting* the *state courts to proceed in an orderly fashion to finally determine the controversy.* ...." (Emphasis supplied).

It is clear that the U. S. Supreme Court was interested in not interfering in an Ohio controversy while it was in progress in state court. No mention was made of what it would do if the State of Ohio had finally determined the matter.

The key in all of the cases cited by Judge Eubanks is the fact that state proceedings were in progress. Indeed, the U. S. Supreme Court, in *Atlantic*, supra, specifically said that "proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through

the state appellate courts and ultimately this Court." That is exactly what the Petitioner was doing in the case at bar. All possible state remedies had been exhausted. His rights, in his opinion, had been violated by the Respondent in view of the U. S. Supreme Court's decision in *In Re Ruffalo*, 88 S. Ct. 1222, 30 L. Ed. 2d 117, and other constitutional grounds. He was at the very beginning of his time to file a petition in the U. S. Supreme Court for a writ of certiorari. His salary was stopped. His health insurance, and that of his family, was stopped. His retirement program was stopped. A new judge was in the process of being appointed to replace him.

42 U.S.C. 1983 gave the Petitioner a cause of action against the Respondent. It was the duty of the U. S. District Court to adjudicate that lawsuit. The Petitioner only asked the District Court to maintain the status quo until his petition for a writ of certiorari was filed and acted upon by the U. S. Supreme Court. Generally, abstention is not favored in actions brought under 42 U.S.C. 1983. *Bergman v. Stein*, 404 F. Supp. 287, and abstention is not appropriate when a suit is not frivolous, *Zurek v. Woodbury*, 446 F. Supp. 1149.

In the landmark case of *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, the doctrine of abstention is thoroughly exhausted. Even there, the *judicial exception* to our long-standing, statutorily-evidenced policy of permitting state courts to try state cases free from interference by federal courts, is discussed. That exception occurs where a person about to be prosecuted in state court can show that he will, if the proceeding in state court is not enjoined, suffer irreparable damage. See *Dombrowski v. Pfister*, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22. See also the excellent dissenting opinion of the late Justice William O. Douglas in *Younger*, supra, at 91 S. Ct. 760.

All of the matters discussed in the above paragraph concerned criminal matters. Also, they concerned pending state cases. The case of Petitioner is not criminal as such, but it is certainly "quasi-criminal", see *Ruffalo*, supra. Also, it is not a pending state case. Irreparable damage was alleged in the Complaint. Certainly those factors would have warranted federal intervention, especially at the stage these proceedings presented themselves. Usually it is the pendency of a state proceeding rather than the nature of the initial forum that makes federal interference in state proceedings untenable. See: *Salem Inn, Inc. v. Frank*, 433 F. Supp. 183. The District Judge in the case at bar certainly had the authority to hear the case. See also the following cases discussing abstention, the Civil Rights Act, and attorneys and judges: *Polk v. State Bar of Texas*, 480 F. 2d 998 (abstention inappropriate); *DeVita v. Sills*, 422 F. 2d 1172, where the court held that the District Court had jurisdiction by virtue of 42 U.S.C. 1983 (pg. 1176); again, in *Devlin v. Sosbe*, 465 F. 2d 169, the Seventh Circuit says that abstention is not to be encouraged in 1983 cases; see *Lenske v. Sercombe*, 491 F. 2d 521, where the Ninth Circuit discusses the possibility of 42 U.S.C. 1983 being an exception to 28 U.S.C. 2283, and recognizing the exception set out in *Dombrowski*, supra.

The decision of the Circuit Court in dismissing the Petitioner's appeal as being moot is erroneous, unjust, unfair, and an abuse of judicial discretion. In the first instance, it misstates the series of judicial events in the matters below. The Petitioner gave notice of his intent to petition the United States Supreme Court for a writ of certiorari, made two requests to the Respondent to stay enforcement of its ruling, and had a motion for rehearing denied by the Respondent, all *prior* to filing his Complaint in the U. S. District Court on March 6, 1981. The state remedies had been completely exhausted at that point.

Secondly, the decision lends credence to Judge Eubanks' "dodging of the bullet" in invoking the abstention doctrine and his daring not to venture into the forbidden "area of state-federal judicial relations". It is *clear* that he was not venturing into an ongoing state matter. It was all over in the state court.

This Court "unanimously determined" that oral argument would not have been of material assistance to them and cited the appropriate rule. Petitioner realizes the tremendous case load this important tribunal has. However, could it not have at least allowed this Petitioner the simple courtesy of taking two or three days from his practice to travel some six hundred miles and then orally present his argument to them? Is this too much to ask of such an important Court? This Petitioner has spent literally thousands of dollars and spent an equal amount of time on this case without even seeing *one* judge! He has lost his position as a judge, lost his income, lost his retirement, lost his insurance, suffered humiliation and rejection. All he asks is an opportunity to be heard.

A general rule is cited by the Court in dismissing Petitioner's appeal as follows:

> "Generally an appeal will be dismissed as moot when events occur during the pendency of the appeal which prevent the appellate court from granting the requested relief."

In support of this general rule the Court cites three cases as authority therefor:

In re Cantwell, 639 F. 2d 1050;

In re Combined Metals Reductions Co., 557 F. 2d 179;

and

Alton & So. Ry. Co. v. I.A.M. & A.W., 463 F. 2d 872.

What the Court failed to do was to recite the added key words in each of the decisions. In *Cantwell*, supra, the 3rd Circuit, in 1981, cited the general rule, but added the important wording which states that an appeal will be dismissed as moot when the appellate court is prevented "from granting *any effective relief.*" (Emphasis supplied).

The 9th Circuit, in *Combined Metals*, supra, in 1977, also adds the words to the general rule: . . . . . "which prevents the appellate court from granting *any effective relief*, ..." (Emphasis supplied).

The D. C. Circuit, in *Alton & So. Ry.*, supra, in 1972, and cited by this Court, is even stronger when it enforces the general rule when the events "have *eliminated any possibility that the court's order may grant meaningful relief* affecting the controversy that precipitated the litigation, . . ." Further, the Court in *Alton*, supra, goes on to say that "a court may continue an appeal in existence, notwithstanding the lapse in time of the particular decree or controversy, when the court discerns a likelihood of recurrence of the same issue, generally in the frameworks of a 'continuing' or 'recurring' controversy, and 'public interest' in maintaining the appeal."

The key case, and "the seminal opinion, in modern jurisprudence is" *Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498, 31 S. Ct. 279, 55 L. Ed. 310 (1911). There, the court noted the general rule calling for dismissal of an appeal if during its pendency something occurs which precludes *effectual relief* to the appealing party. *However, it held the rule inapplicable*, as follows:

> "In the case at bar the order of the Commission may to some extent. . . . . be the basis of further proceedings. But there is a broader consideration. The question involved in the orders of the I.C.C. are usually

> continuing . . . ., and these considerations ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the government, and at another time the carriers have their rights determined by the Commission without a chance of redress."

Key elements of the *Southern Pacific Terminal*, supra, case are: the likelihood of repetition of the controversy and the public interest in assuring appellate review.

In the case at bar, there is very definitely the likelihood of repetition of the controversy. The civil rights of the Petitioner are alleged to have been violated by the Respondent. The controversy is the subject matter of a 42 U.S.C. 1983 case. No review of the actions of the Petitioner has been made by any tribunal. The statute of limitations is two years under Kansas law, and this will not expire until March of 1983. Therefore, the case can be filed in the U. S. District Court anytime before then.

Also, in the case at bar, there is present the necessary element of public assurance of appellate review. If the decision of Judge Eubanks is allowed to stand, the effect may be the denial of appellate review for the Petitioner. Judge Eubanks dismissed the case below *with* prejudice. This means it cannot be refiled or amended. It becomes, in effect, res judicata. Therefore, the invocation by the Court of the general rule as to dismissal of an appeal because of mootness, denies appellate review of his decision and allows him to avoid and evade review. This flies in the face of the vitality of the undeniable doctrine pronounced by the highest Court in the land in *Southern Pacific Terminal*, supra.

CONCLUSION

For the reasons and arguments stated herein the Petitioner respectfully requests that a writ of certiorari issue to the 10th U. S. Circuit Court of Appeals, to review that Court's decision which ordered the Petitioner's appeal from the U. S. District Court dismissed, thereby denying said Petitioner his constitutional right to due process of law.

Respectfully submitted,

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